FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-400

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1986

TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Petitioner,

v.

TRAILWAYS LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Arthur H. Kahn*
John H. Leddy
Eric Hoffman
Attorneys for Respondent, Trailways Lines, Inc.

Of Counsel:

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2000

*Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Does a provision in a collective bargaining agreement requiring the Company to make pension contributions on behalf of former employees who have taken indefinite leaves of absence to work full-time for the Union violate Section 302 of the Labor Management Relations Act, 29 U.S.C. §186?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	4
I. The Court of Appeals Decision Has No Far Reaching Consequences	5
II. There Is No Conflict Between the Circuits on the Question Presented	6
III. There is No "Tension" Between The Decision in This Case and Cases Involving A Refusal to Bargain in Violation of Section 8(a)(5) of the LMRA	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

American Federation of Government Employees, AFL-CIO, Council of Locals No. 214 v. Federal Labor Relations Authority, No. 85-100 (D.C. Cir. August 26, 1986) 10

Axelson, Inc. v. NLRB, 599 F.2d 91 (5th Cir. 1979) 9

BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union, AFL-CIO, 791 F.2d 1046 (2d Cir. 1986) 4-9

BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union, AFL-CIO, 591 F. Supp. 339 (N.D.N.Y. 1984) 7

Knauss v. Gorman, 583 F.2d 82 (3d Cir. 1978) ... 9

Mead Packaging, 273 NLRB 1451 (1985) 11-12

Midstate Telephone Corp. v. NLRB, 706 F.2d 401 (2d Cir. 1983) 9

Statutes:

Federal Service Labor Management Relations Statute, 5 U.S.C. §§7101-7135
5 U.S.C. §7131(a) 11

5 U.S.C. §7131(b) 11

5 U.S.C. §7131(d) 11

Labor Management Relations Act, 29 U.S.C. §§151 *et seq.*
Section 8(a)(1), 29 U.S.C. §158(a)(1) 2, 5, 11

Section 8(a)(2), 29 U.S.C. §158(a)(2) 5

Section 8(a)(3), 29 U.S.C. §158(a)(3) 2, 5, 12

Section 8(a)(5), 29 U.S.C. §158(a)(5) 11, 12

Section 8(b)(1)(A), 29 U.S.C. §158(b)(1)(A) .. 2, 5

TABLE OF AUTHORITIES—*(Continued)*

Statutes:

	Page
Section 8(b)(2), 29 U.S.C. §158(b)(2)	2, 5, 12
Section 302(a), 29 U.S.C. §186(a)	2, 3
Section 302(c)(1), 29 U.S.C. §186(c)(1)	3, 6-8
Section 302(c)(5), 29 U.S.C. §186(c)(5)	3

IN THE

SUPREME COURT OF THE UNITED STATES

No. 86-400

TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Petitioner,

v.

TRAILWAYS LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Trailways Lines, Inc. ("Trailways") submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Trailways, Inc., Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC ("Union") with this Court on September 11, 1986.

STATEMENT OF THE CASE

The collective bargaining agreement between Trailways and the Union purports to require Trailways to make pension contributions on behalf of former employees who have taken indefinite leaves of absence from Trailways to work full-time for the Union. Section 120 of the agreement states, in pertinent part:

> SECTION 120. Leaves of Absence — (a) Any employee, upon application in writing, may be granted a leave of absence, without pay.

* * *

> (i) Employees accepting positions with the Union or parent Union, shall be eligible for Group Insurance and Pension Plan, as provided other employees, and the Company shall make their required contribution on such employees' behalf.

On October 2, 1984, Trailways filed this action seeking injunctive relief and a declaratory judgment that Section 120(i) of the agreement was unlawful under Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, and Sections 8(a) (1) and (3) and 8(b)(1)(A) and (2) of the LMRA, 29 U.S.C. § 158(a)(1) and (3) and § 158(b)(1)(A) and (2).

The District Court granted Trailways' motion for summary judgment, holding that Section 120(i) violated Section 302. (App. 23a-29a.) The United States Court of Appeals for the Third Circuit affirmed. (App. 1a-20a.) Neither Court addressed the Section 8 claims.

It is uncontested that Section 120(i) calls for payments of a type declared to be illegal by Section 302(a), which provides:

> It shall be unlawful for any employer . . . to pay, lend, or deliver or agree to pay, lend, or deliver any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce. . . .

Pension contributions made on behalf of full-time Union officials are plainly "things of value" paid to an "officer or

employee" of the Union representing Trailways employees. (App. at 4a.)

The Union contends in its Petition for Certiorari that these pension contributions fall within the scope of Section 302(c)(1), which sets forth one of the exceptions to Section 302(a).

The Union did not raise this contention in the District Court. There, it relied exclusively on a different exception, Section 302(c)(5), 29 U.S.C. § 186(c)(5). On appeal, however, the Union raised its Section 302(c)(1) argument and the Court of Appeals addressed both alleged exceptions in its Opinion, holding neither exception applicable to the pension contributions required by the collective bargaining provision at issue. (App. at 5a, n.2.)

Section 302(c)(1) states:

> The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or *to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;* . . . . (Emphasis added.)

Because pension contributions on behalf of a full-time Union employee on an indefinite leave of absence from Trailways are not payments made "as compensation for, or by reason of, [the Union official's] service as an employee of [Trailways]," they do not fall within the Section 302(c)(1) exception. In his opinion for the Court of Appeals for the Third Circuit, Judge Garth stated:

> Clearly, the statute contemplates payments to former employees for *past* services actually rendered

> by those former employees *while they were employees of the company*. Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as Union officials while on leave from Trailways are not compensation for their past service to Trailways. (App. 9a.) (Emphasis in original.)

The Union's petitions to the Third Circuit for rehearing and rehearing *en banc* were denied (App. 21a-22a). Now it seeks yet another opportunity to plead its cause.

ARGUMENT

This case meets none of the standards that would justify a grant of certiorari. While the Union's Petition suggests that the issue presented is of great importance to the entire American labor movement, the Union's argument relies upon its amalgamation of the unique contract provision at issue in this case with uncontroversial contract provisions establishing quite different obligations. In fact, the decision of the Third Circuit is quite narrow and casts no doubt on any established labor relations practice.

The Union's second argument — that the decision of the Third Circuit in this case is in "analytical conflict" with the Second Circuit's opinion in *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union, AFL-CIO*, 791 F.2d 1046 (2d Cir. 1986) ("*BASF Wyandotte*") — also depends upon the failure to recognize a crucial distinction. Once the distinction is drawn between payments to active Company employees who are granted released time to perform services for the Union and payments to full-time Union employees who do no work for the Company at all, there remains no conflict, analytical or otherwise, between the Second Circuit and Third Circuit decisions.

The Union also attempts to draw support from allegedly analogous decisions made under other statutory

provisions. But, as Trailways has contended from the outset, Section 120(i) of the collective bargaining agreement not only violates Section 302, as the Third Circuit correctly held, it also violates Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the LMRA as well.

Thus, the Union seeks review of a narrow question on which there is no contrary authority and concerning which there is every reason to believe that the courts below reached the correct conclusion.

I. The Court of Appeals Decision Has No Far Reaching Consequences.

In its Petition, the Union presents a litany of major collective bargaining agreements that allegedly contain provisions "similar" to the one at issue in this case. The similarity the Union perceives is that all such provisions obligate employers to pay their employees for time that those employees spend on union business. Trailways contests neither the existence nor the long and venerable history of such provisions. The Second Circuit's opinion in *BASF Wyandotte, supra*, 791 F.2d at 1050-53, contains an excellent discussion of the practices the Union refers to and of Congress's manifestations of approval of them.[1]

However, those practices have nothing whatsoever to do with the narrow issue decided by the Court of Appeals for the Third Circuit in the present case. The provision at issue here, Section 120(i), requires payments not to employees of Trailways, but to full-time employees of the Union who are on indefinite leaves of absence from their previous work for the Company. These are not Trailways employees on released time from their work

1. Section 8(a)(2) of the LMRA, as amended in 1947, specifically provides that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." 29 U.S.C. §158(a)(2).

for the Company. They are Union employees who happen to have once worked for Trailways. To group together a provision requiring pension payments on behalf of full-time Union officials who do no work for the Company with provisions requiring payments to Company employees who do some work for the Union simply begs the question. Are the provisions relevantly similar or aren't they? The Third Circuit properly held that they aren't.

The Union is careful not to assert that any other provision of any major collective bargaining agreement is identical to the one at issue or has the same effect. In fact, no such provision has been cited at any step of the proceedings in this case. The Third Circuit decision will cause no one to doubt the legality of "no-docking" provisions such as those addressed in *BASF Wyandotte*. *See infra*, pp. 6-9. Nor will anyone doubt, because of the Third Circuit opinion, the legality of any other provisions that provide for payments to Company employees who spend part of their time engaged in Union activities. The Third Circuit in the present case held only that provisions calling for pension contributions by an employer on behalf of full-time Union employees clearly violate Section 302.

II. There Is No Conflict Between the Circuits on the Question Presented.

The Union's assertion that the Third Circuit opinion in this case and the Second Circuit opinion in *BASF Wyandotte* are in "analytical conflict" is a transparent attempt to conceal the fact that their results are not in conflict at all. The Second Circuit held that a "no-docking" provision fell within the Section 302(c)(1) exception and was, therefore, legal. The agreement guaranteed four hours per day of released time during which BASF employees, the Union president and secretary, could engage in Union business. As we noted in

Section I, *supra*, such a provision is very different from the provision at issue in this case. The Court of Appeals for the Third Circuit recognized this fact in its discussion of the District Court opinion that was affirmed by the Second Circuit, *BASF Wyandotte Corp. v. Local* 227, *International Chemical Workers Union*, 591 F.Supp. 339 (N.D.N.Y. 1984). Judge Garth said:

> There is a sound distinction between payments made to a union official who goes on *temporary* leave to conduct union business and then returns to *active* employment, and payments on behalf of union officials who are on *full-time* leave but who may *never* return to full-time employment of his employer. (App. 11a.) (Emphasis in original).

This "sound distinction" harmonizes the conclusions of the Second and Third Circuits.

The "analytical conflict" suggested by the Union derives from Judge Kearse's interpretation of the language of Section 302(c)(1), which exempts payments of an employer to an employee made "as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. §186(c)(1). Focusing on the phrase, "by reason of," Judge Kearse noted that the point of this alternative language was to permit certain "fringe benefits," such as vacations or leave for jury duty, which are not "compensation for . . . service" but payments made "by reason of" services rendered. Of course, pension *benefits*, as opposed to pension *contributions*, are perhaps the paradigm of such lawful payments. These are payments "occasioned by the fact that the employee has performed or will perform work for the employer." *BASF Wyandotte*, *supra*, 791 F.2d at 1049.

The Union argues that this language would compel a different result in the instant case. Because the pension contributions on behalf of Union officials on indefinite leave from the Company arguably might be viewed as payments "occasioned by the fact that the employee has performed or will perform work for the employer," the Union urges that they fall within the exception of Section 302(c)(1).[2]

However, it is by no means clear that even the Second Circuit would view its analysis as compelling this result. The Second Circuit was evaluating payments made to Union officials who were indisputably current, active employees of the Company. Indeed, BASF sought in its unsuccessful suit to distinguish between payments for the time Union officials spent in meetings with management and payments for the time the Union officials spent on other Union-related business, arguing that the latter, but not the former, violate Section 302. The Court's inability to see a "meaningful distinction between time spent in meetings with management and time spent in preparing for those meetings" led it to conclude that the Section 302(c)(1) exception applied to the payments there at issue.

The Court, however, explicitly ignored "for purposes of this case the reference in Section 302(c)(1) to former employees, since no-docking provisions have relevance only to persons who are currently serving as employees." *BSAF Wyandotte, supra*, 791 F.2d at 1049 n.1. Since the

---

2. The Third Circuit properly found that the exception in Section 302(c)(1) concerning payments to "former" employees as "compensation for, or by reason of," their service as employees did not apply to pension contributions measured by the salaries being paid by the Union to full-time Union officials for contemporaneous services to the Union. The Court also held that the exception for payments to "present" employees did not apply because the Union officials perform no present compensable services for Trailways. (App. 9a, n.5)

Union officials subject to Section 120(i) are not "currently serving as employees" of Trailways, the Second Circuit opinion itself makes clear that its analysis is not intended to apply. What is encompassed within the concept of payments made "by reason of" an employee's *former* employment remains open. It is plainly intended to include pension *benefits*, but nothing in the *BASF Wyandotte* opinion remotely suggests that it includes pension *contributions*, which are "payments in lieu of wages." *Knauss v. Gorman*, 583 F.2d 82, 89 (3d Cir. 1978). The Second Circuit, presented with Section 120(i), would certainly see a "meaningful distinction" between payments for released time to current employees and payments of pension contributions on behalf of former employees who are now full-time Union officials. The Second Circuit probably would — and certainly should — agree with the Third Circuit that the latter payments are not "by reason of [the Union officials'] service as [Trailways] employee[s]" and are therefore unlawful. Thus, even the "analytical conflict" identified by the Union is chimerical.

III. There is No "Tension" Between The Decision in This Case and Cases Involving A Refusal to Bargain in Violation of Section 8(a)(5) of the LMRA.

The Union seeks to bolster its untenable Section 302 argument by citation to cases decided under Section 8 of the LMRA which, according to the Union, are "in tension with" the decision of the Third Circuit in the present case. Apparently, this is somewhat less even than an "analytical conflict." The cases in question are *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), and *Axelson, Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979). These decisions of the Second and Fifth Circuits enforced orders of the National Labor Relations Board

("NLRB") requiring that employers bargain about paying the wages and expenses of employees engaged in collective bargaining negotiations for the union.

The Union contends in its Petition that, because reimbursement of employee negotiators is a mandatory subject for bargaining, it cannot be illegal to make such payments. This conclusion seems uncontroversial. However, payments to present company employees who spend a part of their time representing the union in negotiations with the company are not comparable, as we have been compelled to repeat several times in this Brief, to the payment of pension contributions for full-time union officials who do *not* work for the company. Thus, this "line" of cases is clearly beside the point.

Even further afield is the Union's reliance on a case decided under the Federal Service Labor-Management Relations Statute ("FSLMR"), 5 U.S.C. §§ 7101-7135. In *American Federation of Government Employees, AFL-CIO, Council of Locals No. 214 v. Federal Labor Relations Authority*, No. 85-1500 (D.C. Cir. August 26, 1986) ("*AFGE*"), the Court held that the Air Force Logistics Command had to bargain about a proposal made by the Union to allow 12 Union representatives 100% "official time." The Union apparently views the holding in *AFGE* — that the FSLMR compels bargaining even about a proposal for 100% "official time" — as some indication that it is not illegal under the LMRA for a private employer to make pension contributions for full-time Union employees.

Contrary to the impression given by the Union's Petition, however, the District of Columbia Circuit was applying in *AFGE* a *statutory provision* specifically mandating negotiations concerning an Agency's compensation of its employees for time spent on union business, *i.e.*, "official time." The FSLMR requires that

> any employee representing an exclusive representative . . . shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. § 7131(d). There is, of course, no parallel provision in the LMRA.

Furthermore, the "official time" proposal explicitly sanctioned by the FSLMR differs considerably from the provision at issue here. Section 7131 provides that "official time" *must* be granted for negotiation of a collective bargaining agreement and associated activities, but *may not* be granted for activities relating to the internal business of the Union. 5 U.S.C. § 7131 (a) and (b). This restriction constrains Agency employees, even those on 100% official time, to a temporary release from their service as employees for a limited purpose. By contrast, the activities of the full-time, permanent Union employees in the instant case are completely independent of any employment relationship to Trailways and are controlled exclusively by the Union. Thus, the Union's argument founders both on the law and on the facts.

Petitioner's reliance on cases involving an alleged "refusal to bargain" is misplaced, as is demonstrated by the decision of the NLRB in *Mead Packaging*, 273 NLRB 1451 (1985). In that case, the employer unilaterally discontinued the granting of insurance coverage and/or pension benefit multipliers to employees on extended leaves of absence to serve as officers of the Union. These benefits were not available to employees on leave for any other reason. The Board held that this action by the employer did not violate the employer's duty to bargain under Sections 8(a)(1) and 8(a) (5) of the LMRA. The Board further stated:

> [I]f the issue were before us, we would find that the Respondents' provision of additional benefits to union officers under their collective-bargaining

> agreements with the Union violated Section 8(a)(3) and 8(b)(2) of the Act. Since the Respondents merely declined to continue to provide a benefit to the union officers which, as discussed above, had an unlawful disparate impact on employees, we find that they did not violate Section 8 (a)(5) and (1) by doing so without bargaining with the Union.

Id. at 1452.

There is no question that Section 120(i) grants preferential treatment to Union officials in violation of Sections 8(a)(3) and 8(b)(2). Of all those who take leaves of absence from Trailways, only those who assume full-time Union positions would have Trailways make pension contributions on their behalf by virtue of Section 120(i).

Under scrutiny, the Union's arguments do not support its Petition. The question presented is narrow and the Third Circuit decided it correctly. Moreover, the Union's subtle attempts to describe the decision below as in "tension" with other decisions would not rise, even if successful, to the level of a conflict between the Circuits. Having failed to demonstrate any "tension" whatsoever, the Union has given this Court no reason to review the Third Circuit's decision.

CONCLUSION

For the foregoing reasons, the Union's petition for a writ of certiorari should be denied.

Respectfully submitted,

Arthur H. Kahn
John H. Leddy
Eric Hoffman
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2000

Attorneys for Respondent Trailways Lines, Inc.

Dated: October 10, 1986